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Supreme Court of the United States

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, and VERIZON COMMUNICATIONS, INC.,

Cross-Petitioners,

v.

CYNTHIA YOUNG, on behalf of herself and all others similarly situated,

Cross Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a plan committee with broad discretionary authority to "interpret the plan and to decide all matters arising thereunder" abuse its discretion by correcting a scrivener's error in a plan document in connection with the claims review process?

PARTIES TO THE PROCEEDING

Cross-petitioners are Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications, Inc. Cross-respondents are Cynthia Young and a class of persons who participated in Verizon's Bell Atlantic Cash Balance Plan as of December 31, 1995.

CORPORATE DISCLOSURE STATEMENT

Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications, Inc. have no parent company. There is no publicly held company that owns 10 percent or more of their stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications Inc. respectfully file this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The Court should deny the petition for a writ of certiorari in No. 10-765 and, if the Court does so, it should also deny this cross-petition. If the Court grants that petition, however, it should also grant this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals is published at 615 F.3d 808 (7th Cir. 2010). Pet. App. 1a-28a.[1] The opinion of the district court reversing Verizon's administrative decision is published at 575 F. Supp. 2d 892 (N.D. Ill. 2008). Pet. App. 144a-90a. The opinion of the district court granting reformation is published at 667 F. Supp. 2d 850 (N.D. Ill. 2009). Pet. App. 29a-143a.

JURISDICTION

The court of appeals issued its opinion on August 10, 2010. It denied a motion for rehearing and rehearing en banc on September 8, 2010. Pet. App. 191a-92a. This Court docketed the petition for a writ

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari in No. 10-765.

of certiorari on December 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Seven months after Bell Atlantic changed the benefit formula under its pension plan to a cash balance formula, it adopted a formal plan document that contained a significant mistake. It is undisputed that the mistake was a scrivener's error. The plan committee exercised its discretionary authority to interpret the plan to correct the scrivener's error. The district court rejected that interpretation as exceeding the plan committee's authority. Nonetheless, the district court ruled in favor of cross-petitioners on their counterclaim for reformation, finding by clear and convincing objective evidence that the second reference in a plan provision to a transition factor was a scrivener's error that was inconsistent with participants' expectations regarding their pension benefits. The court of appeals affirmed the district court's reformation ruling without separately addressing the plan committee's authority to correct the scrivener's error in the first instance.

This cross-petition raises what is, in essence, an alternative basis on which this Court could reject cross-respondents' claim for additional benefits. Because the relevant plan documents gave the plan administrator broad discretionary authority to "interpret the Plan and to decide all matters arising thereunder," the lower courts could and should have deferred to the reasonable decision of the plan administrator to deny cross-respondents' claim for

additional benefits based on the scrivener's error. If the lower courts had done so, there would have been no need to undertake the lengthy litigation of the reformation counterclaim.

As explained in the brief in opposition in No. 10-765, true scrivener's errors are rare, and the reformation issue addressed by the court of appeals clearly does not merit this Court's review. It is equally clear, however, that nothing in ERISA precludes the plan administrator in the claims review process -- in addition to the courts through the reformation process -- from remedying an obvious and consequential scrivener's error. In the unlikely event the Court grants the petition in No. 10-765, it should also grant this cross-petition to ensure that there is no obstacle to this Court considering both methods of correcting a scrivener's error.

1. Cross-petitioners' opposition to the petition for a writ of certiorari in No. 10-765 contains a detailed statement of facts, which will not be repeated in full here. Briefly stated, cross-respondent filed suit in December 2005 and moved to amend the complaint in July 2006 to add a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), based on a duplicative reference to a transition factor in a formula for calculating benefits. The district court stayed all proceedings to permit the plan administrator to consider cross-respondent's administrative claim. The plan administrator issued its decision on December 8, 2006, denying the claim. Pet. App. 155a-57a. In connection with its review and denial of cross-respondent's claim for benefits,

the plan administrator compiled a record consisting of 15,000 pages of documents.

The plan administrator determined that the duplicative reference to a transition factor in the 1996 formal plan document, which was carried over to the 1997 restatement of that document, was a mistake. It based this conclusion on multiple facts, including the fact that the plan amendment recommended by the Bell Atlantic Corporate Employees' Benefits Committee and approved by the Human Resources Committee of the Bell Atlantic Board of Directors called for multiplying a base amount by the transition factor only once, not twice. The plan administrator in 2006 also found that all employee communications regarding the new plan and all notices to employees advising them of the amount of their benefits called for a single multiplication by the transition factor. The plan administrator looked at the formal plan document itself and concluded that, if the intent had been to multiply the transition factor twice, it would have been more "natural" to revise the table of transition factors, rather than to multiply by each factor twice, and that all of the other plan provisions calling for multiplication by a transition factor provided for a single multiplication. Pet. App. 155a-57a.

Cross-respondent filed an administrative appeal of the decision. On April 2, 2007 the Verizon Claims Review Committee denied the appeal. Pet. App. 157a-59a. The committee did so on the basis of other plan documents and participant communications, both of which referred to only a single multiplication. The committee also looked at

the structure of the plan as a whole and noted that the second multiplication would entitle cross-respondent to receive benefits exceeding the benefits of similarly situated participants who were older and had more service, as well as benefits far larger than what cross-respondent would have earned under the prior plan formula.

The district court reviewed the committee's decision on the basis of the administrative record, which included more than 15,000 pages of documents. The court agreed with cross-respondent's contention that "the language regarding the second reference to the transition factor is not ambiguous" (Pet. App. 175a-76a); ruled that "[b]ecause the Committee found this language to be a mistake, it should have treated it as such, rather than as an ambiguity subject to interpretation by means of extrinsic evidence" (Pet. App. 176a-79a); and held that the correction of a mistake is a matter "more appropriately reserved for decision by the court." Pet. App. 187a. Addressing the issue *de novo*, the district court subsequently ruled that cross-petitioners had established by clear and convincing objective evidence the plan should be reformed to correct the mistake. Pet. App. 126a-27a.

Based on those rulings, the district court entered final judgment in favor of cross-respondents to the extent that they argued that the plan administrator erred by denying benefits under the plan as written. But the court also entered final judgment in favor of cross-petitioners on their counterclaim for reformation, and therefore ordered that the class members were "not entitled to any additional Plan

benefit distributions by reason of this litigation." Pet. App. 141a-42a.

2. Cross-respondents appealed, and cross-petitioners cross-appealed the district court's judgment concerning the plan administrator's exercise of discretion under the plan as written. The court of appeals affirmed the district court's reformation ruling without addressing the cross-appeal. Cross-respondents thus obtained no additional benefits. Pet. App. 18a, 22a-23a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

ERISA Allows A Plan To Authorize The Plan Administrator To Correct Drafting Mistakes In A Formal Plan Document.

The petition in No. 10-765 asks the Court to consider the standards that courts should apply in addressing, *de novo*, scrivener's errors in ERISA plan documents. That issue does not merit this Court's review. Nonetheless, one thing is clear: ERISA does not foreclose correction of an egregious scrivener's error. Not only do the courts possess the power of reformation, as exercised below, a plan administrator with broad discretion to interpret the plan also possesses the power to correct such errors in the first instance. Thus, in the unlikely event the Court grants plenary review to consider the correction of scrivener's errors in ERISA plans, it should also grant this cross-petition so that there will not be any procedural obstacle to the Court's full consideration of all potential methods of correcting such errors.

1. Because this cross-petition raises an alternative ground for the same relief (denial of additional benefits based on the scrivener's error), it is possible that the Court could reach this alternative ground without granting this cross-petition. Ordinarily, a respondent is free to raise alternative grounds without filing a cross-petition. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

In this case, however, the district court proceedings were structured such that the district court first declined to defer to the plan committee's correction of the scrivener's error, later allowed reformation pursuant to a counterclaim, and specifically entered judgment against cross-petitioners on the first of those issues (even though the court's judgment ultimately entered the relief that cross-petitioners requested—that cross-respondents take nothing). *See* pp. 6-7, *supra*. Thus, affirming the result below on the alternative ground that the plan committee had authority to correct the error might arguably be understood to enlarge the judgment below, which would necessitate a cross-appeal. *See generally Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Cross-petitioners have filed this cross-petition out of an abundance of caution, just as they filed a cross-appeal below.

2. While true scrivener's errors are rare, plan administrators, as well as courts, should have authority to correct them.

ERISA requires a plan to be maintained pursuant to written instruments and to specify the basis on

which payments are made to and from the plan. *See* ERISA § 402(a)(1), (b)(4), 29 U.S.C. § 1102(a)(1), (b)(4). ERISA also requires plan fiduciaries to discharge their duties under the plan in accordance with the documents and instruments governing the plan to the extent that the documents and instruments are consistent with ERISA. *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82 (1995).

Like all other kinds of documents, however, plan documents do not always speak for themselves. Thus, this Court has ruled that if the terms of the plan give the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, the courts should defer to the administrator's or fiduciary's decision as long as that decision is reasonable. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Indeed, where, as here, the terms of the plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict of interest. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *see also Conkright v. Frommert*, 130 S. Ct. 1640 (2010) (ruling that there was no reason to deny deference to an administrator's second interpretation of the plan simply because the administrator had made an honest mistake in its prior interpretation of the plan).

The Court's decisions in *Firestone* and its progeny do not suggest that a plan administrator's interpretation of a plan is entitled to deference only

if the interpretive issue arises for a reason other than a drafting error. Nor is there any reason to cabin plan administrators' authority in that manner. "Deference [to plan administrators] promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation." *Conkright*, 130 S. Ct. at 1649.

That rationale for deference applies with full force to drafting errors, especially considering that the plan administrator is in the best position to determine whether a plan provision contains an error and whether the participants had reasonable expectations based on that error. The claims review process also provides numerous participant safeguards, including two levels of administrative review, full access to all documents considered by the plan administrator in connection with the review, and judicial review of the plan administrator's decision. *See* 29 C.F.R. § 2560.503-1. Deference to administrators' efficient resolution of disputes -- as opposed to requiring plan administrators seek reformation by initiating expensive class action litigation against plan participants -- therefore furthers ERISA's objectives of substantial participant protections while avoiding the imposition of "administrative costs, or litigation expenses" on plans that "unduly discourage employers from offering plans in the first place." *Conkright*, 130 S. Ct. at 1649 (citing cases).

In this case, the plan gave broad "discretionary power" to the plan committee "to interpret the Plan and to decide all matters arising thereunder,

including the right to remedy possible ambiguities, inconsistencies, and omissions," and it did not limit the sources that the committee could consult in doing so. That broad grant of discretionary power includes authority to address scrivener's errors. *Cf. Conkright*, 130 S. Ct. at 1647 ("Nothing in that provision suggests that the grant of authority [to construe the Plan] is limited to first efforts to construe the Plan.").[2]

3. Ordinarily, the question presented in this cross-petition would not warrant this Court's review because obvious and consequential scrivener's errors are rare and there is no circuit split either on the question presented in this cross-petition or on reformation of ERISA plans, as explained in the brief in opposition in No. 10-765. But if this Court grants the petition in No. 10-765 to consider whether and how ERISA permits the correction of scrivener's errors, it should grant this cross-petition to ensure

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[2] This Court's decision in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009), is hardly to the contrary. *Kennedy* emphasizes the importance of the text of a plan's governing documents. But *Kennedy* does not require, for example, that documents outside of the plan's governing documents be disregarded in administering a plan, in resolving ambiguities in a plan's governing documents, in deciding whether a plan contains a drafting error, or in deciding how to correct a drafting error. Indeed, the Court's ruling in *Kennedy* strongly suggests that unless the plan explicitly forbids it, plan administrators are permitted, in their discretion, to consult relevant outside documents in resolving such issues. *Id.* at 877-78.

that there are no procedural obstacles to considering one of the two obvious alternatives for correcting these rare errors.

CONCLUSION

If the Court grants the petition for a writ of certiorari in No. 10-765, it should also grant this cross-petition for a writ of certiorari.

Respectfully submitted,

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